Supreme Court, U. S.
FILED
MAR 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

No. 77-1026

JANENE RILEY, a minor, by and through DELORES GIBBS, her mother, guardian and next friend,

Appellant,

vs.

STATE OF OHIO, et al.,

Appellees

On Appeal From The
Supreme Court of the State of Ohio

MOTION TO DISMISS OR AFFIRM

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The Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Ohio on the ground that it is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of certain provisions of the Ohio "Court of Claims Act" (Ohio Revised Code Section 2743.01 et seq, 1975).

This statute provides a waiver of the State's immunity from liability and a consent by the State to be sued, and have its liability determined, in the Ohio Court of Claims, created by the statute in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in the statute. The statute specifically excludes political subdivisions, including counties, from "state" as used in the statute thus excluding those political subdivisions from the waiver of immunity from liability and consent to suit. The statute therefore leaves the lesser political subdivisions of the State in the same position they enjoyed prior to the enactment of the Ohio "Court of Claims" Act.

B. The Proceedings Below

Appellant was injured by an employee of Warren County, Ohio and brought suit in the Court of Claims of Ohio against the State of Ohio and Warren County. Appellants' Complaint was dismissed and the Court of Claims Act including the provisions excluding lesser political subdivisions, including counties, from the waiver of immunity and consent to suit were held valid by the Ohio Court of Claims. The 10th District Court of Appeals of Ohio affirmed the Court of Claims and Appellants' Motion to Certify the Record below in the Supreme Court of Ohio was overruled.

II.
ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

Since the case of *Palmer v. Ohio,* 248 U.S. 32 (1918), it has been well settled that the question of state governmental immunity is not one for review by this Court. That case established that the right of individuals to sue a State cannot be derived from the Constitution or laws of the United States but can only come from the consent of the State and is a question of local state law as to which the decision of the State Supreme Court is controlling, no federal right being involved. The Ohio "Court of Claims Act" (O.R.C. 2743.01 et seq) does not create classes of plaintiffs, it simply recognizes different and distinct classes of governmental subdivisions which have existed within Ohio since it achieved statehood. That lesser political subdivisions within the State, such as counties, are fundamentally different in both form and substance from the State itself is obvious. The tax base and means of raising revenue of political subdivisions differs greatly from that of the State. Some political subdivisions, including counties, have absolutely no legislative powers. Yet counties operate independently through locally elected officials who are not directly controlled by the State. A county's area of activity is different than that of the State as is its delineation of authority.

It is settled that equal protection does not require that all inconsistencies be eliminated. The Constitution does not require that things which are different be treated as if they were the same. *Tigner v. Texas,* 310 U.S. 141 (1940). In considering an "Equal Protection Argument" in relation to certain limited waivers of the immunity of some political subdivisions, the Supreme Court of Ohio found that substantive differences existed between the State and its political subdivisions:

> "Assuming that such observation refers to municipalities, or other political subdivisions, there are sufficient substantive differences between them and the State to allow for such different results. Whether it is the nature of the conduct or activity undertaken, or the differences in its governmental and corporate existance, we need not now explore. Those substantive differences permit of different remedies and defenses."

Krause v. The State of Ohio, 31 Ohio St. 2d. 132, 146, (1972) appeal to the United States Sup. Ct. Dismissed for want of a substantial federal question, 409 U.S. 1052 (1972); Petition for Rehearing Denied 410 U.S. 918 (1973).

Assuming arguendo that a class of plaintiffs collaterally results from the provisions of the Ohio "Court of Claims Act" (O.R.C. 2743.01 et seq), such a classification does not trammel fundamental personal rights and is not drawn upon inherently suspect distinctions such as race, religion or alienage and therefore the classification does not violate the "reasonable relationship" test expressed in the case of *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976). There is no denial of equal protection for the act in question does not permit some to bring an action against political subdivisions but refuse such permission to others. The application is uniform.

The State has a legitimate interest in seeking to protect the fiscal integrity of its political subdivisions. The differences in the tax base and means of obtaining revenue between the State and its political subdivisions alone constitute sufficient rational bases for differentiation in the waiver of liability and consent to suit. States are accorded broad discreation in regulations which further a legitimate State interest, and this is seen as a strictly legislative function. *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974) and *McGowan v. Maryland,* 366 U.S. 420 (1961).

The equal protection clause of the fourteenth amendment does not require complete parity in classifications established by statutory scheme. This Court has held that "where rationality is the test, a state does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect." *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 316 (1976). This court has made it clear that States are not limited to an "'all or nothing" approach, since the equal protection clause does not require states to "choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams,* 397 U.S. 471, 485 (1970).

It is clear from *Palmer v. Ohio,* supra, that this court has established that an individual does not have a fundamental constitutional right to sue a State. It follows logically that failure to provide a forum for such an action cannot amount to a denial of due process.

The Constitution of the State of Ohio provides as follows:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law. *Article 1, Section 16 of the Ohio Constitution.*

It has been held that the above quoted provision is "not self-executing;" and statutory authority is required as a prerequisite to the bringing of suits against the State. *Krause v. State,* supra. The required legislation to permit actions against political subdivisions of the State was not enacted by the legislature and in the absence of such legislation no right of action against those political subdivisions exists. Again the failure to provide a forum for the enforcement of non-existent right cannot amount to a denial of due process.

Similar questions to those presented by the case at bar arose in connection with actions under the United States Court of Claims Act and this court dealt with those questions as follows:

> "The Government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and rules of practice to be observed in such suits. It may restrict the jurisdiction of the Court to a consideration of only certain classes of claims against the United States. *McElrath v. U.S.,* 102 U.S. 426, 440 (1880).

No denial of due process exists as a result of a partial waiver of governmental immunity. An expansion of individual rights occurs; however that expansion of rights was not sufficient to create a right in appellant to bring the action which she seeks to bring.

III.

CONCLUSION

Wherefore, Appellees respectfully submit that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellees respectfully move the Court to dismiss this Appeal or in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Ohio.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that six copies of the foregoing Brief was mailed by certified mail, postage prepaid, on this 10th day of March, 1978 addressed to Ambrose H. Lindhorst and Leo J. Breslin, Lindhorst & Dredame, 1200 American Building, Cincinnati, Ohio 45202, Attorneys for Appellants. I further certify that all parties required to be served have been served.

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